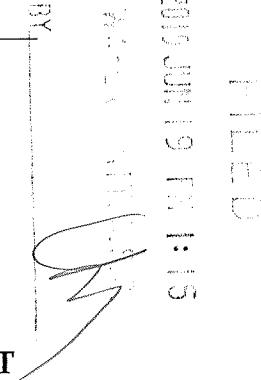
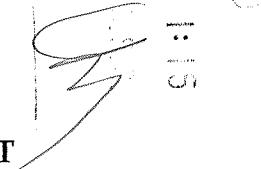


STATE OF NORTH CAROLINA

COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE  
SUPERIOR COURT DIVISION19 CVS \_\_\_\_\_  


RURAL EMPOWERMENT ASSOCIATION )  
 FOR COMMUNITY HELP, NORTH )  
 CAROLINA ENVIRONMENTAL JUSTICE )  
 NETWORK, WATERKEEPER ALLIANCE, & )  
 WINYAH RIVERS ALLIANCE, )  
 Plaintiffs, )  
 v. )  
 STATE OF NORTH CAROLINA, TIMOTHY )  
 K. MOORE, in his official capacity at )  
 Speaker of the North Carolina House of )  
 Representatives; PHILIP E. BERGER, in his )  
 official capacity as the President Pro )  
 Tempore of the North Carolina Senate, )  
 Defendants. )

  
COMPLAINT**I. INTRODUCTION AND SUMMARY OF ACTION**

1. North Carolina House Bill 467 and Senate Bill 711, codified at North Carolina General Statutes §§ 106-701 & 106-702 (2017, 2018), unconstitutionally deprive North Carolinians of fundamental property rights and violate the North Carolina Constitution's prohibition on "special laws" that create unreasonable classifications and relate to the abatement of nuisances ( Article II, Section 24); the guarantee of due process and the protection of the fundamental right to property (Article I, Section 19); and the right of all citizens to a trial by jury in cases respecting property rights (Article I, Section 25). These statutes should be declared unconstitutional and their enforcement enjoined.

2. The statutes (hereinafter “HB 467” and “SB 711”) were adopted in direct response to hundreds of nuisance suits filed against Murphy-Brown, LLC, the production subsidiary of Smithfield Foods Corporation (“Smithfield”), by neighbors to industrial swine facilities for the unreasonable interference with the neighbors’ use and enjoyment of their property that is caused by the stench, flies, pollution and others harms those facilities cause. To date, these nuisance suits have resulted in five jury verdicts against Smithfield. Each jury found that the odor, pollution, and other adverse impacts from Smithfield’s swine operations caused unreasonable and substantial interference with the plaintiffs’ use and enjoyment of their property.

3. These laws not only violate the state constitution, but also have disparate impacts on low-wealth and non-white North Carolinians, who disproportionately live where North Carolina has permitted industrial hog facilities to develop and operate. These statutory restrictions on the nuisance remedy, which is the most effective legal remedy for the harms to property rights that these residents suffer from industrial agricultural operations, amplify the marginalization of those who are already disenfranchised in the state.

## II. PARTIES

### a. North Carolina Environmental Justice Network

4. Plaintiff North Carolina Environmental Justice Network is (“NCEJN”) is a statewide grassroots membership-based organization whose mission is to promote health and environmental equality for all people of North Carolina through community action for clean industry, safe workplaces, and fair access to all human and natural resources. It

seeks to accomplish these goals through organizing, advocacy, research, and education based on principles of economic equity and democracy for all people.

5. NCEJN is a not-for-profit corporation organized under the laws of North Carolina, and a tax-exempt charitable corporation under section 501(c)(3) of the Internal Revenue Code.

6. NCEJN maintains its headquarters in Durham, North Carolina.

7. Members pay annual dues to NCEJN and vote on matters that direct the organization's policies and activities.

8. NCEJN's membership includes individuals and local community organizations consisting of members who live, work, recreate, and own property near industrial hog operations (IHOs), and are forced to contend daily with the nuisances these facilities generate, including air and water pollution, noxious odors, truck traffic, flies and buzzards, and swine waste that makes its way onto their property and into their homes.

9. NCEJN has worked for more than a decade to encourage meaningful regulation and monitoring of North Carolina's animal agriculture industry, and to end industry practices that create nuisances, harm people's health and cause environmental racism.

10. HB 467 and SB 711 frustrate NCEJN's mission and directly harm its organizational and individual members, many of whom have lost the right to bring a nuisance action against neighboring IHOs due to the statutory restrictions. Even if some

members may still be able to bring an action, they will not do so because their legal costs would likely exceed the amount of damages they are now able to recover.

11. NCEJN has an interest in the specific remedies available in nuisance claims, including remedies for the loss of use and enjoyment of property, because they are the most effective legal means to hold IHOs accountable and deter the industry from continuing its harmful practices.

12. Because of HB 467 and SB 711, NCEJN has been forced to divert its valuable and limited resources away from its core mission and planned organizing, advocacy, research, and education activities—including those arising from the recent hurricanes that devastated its member communities—in order to investigate, respond to, mitigate, and address the concerns of its members resulting from the State's elimination of their nuisance remedy against IHOs.

13. While the General Assembly was considering HB 467 and SB 711, NCEJN attended legislative committee meetings, gave public comments, drafted blog posts, spoke with media, and otherwise tried to get state lawmakers and the Governor to hear and address NCEJN's concerns about the laws' unconstitutional and racially discriminatory deprivation of people's rights.

14. In early spring 2017, NCEJN mobilized scores of people from Eastern North Carolina to testify in legislative meetings about the community impacts of HB 467. It did the same with respect to SB 711 in 2018.

15. Both prior to and following the laws' passage, NCEJN also used time at its meetings to discuss the impacts of HB 467 and SB 711 on its members, including using

time and resources to discuss the passage of the laws and hear from impacted communities affected by those laws during the annual NCEJN Summit.

16. NCEJN has also diverted its valuable and limited resources away from its core mission and planned organizing, advocacy, research, and education activities in order to find other ways to hold the IHOs accountable for the adverse impacts on the community's health, well-being and environment and to get the industry to change the practices which cause the harms that the legal remedy for nuisance is uniquely designed to address.

17. If NCEJN were not forced to divert resources in this manner, it would be able to put its resources towards other pressing needs.

18. Many NCEJN members whose right to bring a nuisance claim was eliminated by HB 467 and SB 711 fear retaliation from Smithfield, the Pork Council and/or their neighbors who work for the IHOs if they were named as individual plaintiffs in this lawsuit.

***b. Rural Community Empowerment Association for Community Help***

19. Plaintiff Rural Empowerment Association for Community Help ("REACH") is a membership-based organization whose mission is to address social, economic, and environmental inequities in Duplin, Sampson, Pender and Bladen Counties and protect its members' health and welfare. REACH has been a member of the NCEJN since 2004.

20. REACH is a not-for-profit corporation organized under the laws of North Carolina and is a tax-exempt charitable corporation under section 501(c)(3) of the Internal Revenue Code.

21. REACH maintains its headquarters in Warsaw, North Carolina.
22. REACH's members vote on and participate in setting its organizational activities.
  23. REACH provides resources and support to residents of Duplin, Sampson, Bladen and Pender Counties who are directly impacted by the pollution and other adverse effects of IHOs and offers education and assistance in related areas. REACH's programs include instruction on environmental awareness, scientific research related to industrial swine operations' public health and environmental impacts, sustainable agriculture, small business development and homeownership, among other topics.
  24. REACH's membership includes individuals who live, work, recreate, and own property near IHOs and are forced to contend daily with the nuisances these facilities generate, including air and water pollution, noxious odors, truck traffic, flies and buzzards, and swine waste that makes its way onto their property and into their homes.
  25. HB 467 and SB 711 frustrate REACH's mission and directly harm its members, many of whom have lost the right to bring a nuisance action against neighboring IHOs due to this legislation. Even if some REACH members may still be able to bring an action, they will not do so because their legal costs would likely exceed the amount of damages they are now able to recover.
  26. Because these laws have taken away its members' rights, REACH has diverted its resources from other important projects—including recovery from recent hurricanes that devastated many of its members' homes—to develop and pursue other

ways to hold IHOs accountable and deter industry from continuing harms it causes to REACH members.

27. Many REACH members whose right to bring a nuisance claim was eliminated by HB 467 and SB 711 fear retaliation from Smithfield, the Pork Council and/or their neighbors who work for IHOs if they were named as individual plaintiffs in this lawsuit.

28. During the legislative process for both bills, REACH provided transportation for affected community members to attend legislative committee meetings, gave public comments, submitted regional and state newspaper Letters to the Editor detailing its concerns, met with media, and otherwise tried to get state lawmakers and the Governor to hear and address REACH's concerns about HB467 and SB 711's unconstitutional and racially discriminatory deprivation of its members' rights.

29. Since the passage of HB 467 and SB 711, REACH has been forced to divert its valuable and limited resources away from its core mission and planned organizing, advocacy, research, and education activities—including those arising from the recent hurricanes that devastated its member's communities—in order to investigate, respond to, mitigate, and address the concerns of its members resulting from the State's elimination of their nuisance remedy against IHOs.

30. REACH has also diverted its valuable and limited resources away from its core mission and planned organizing, advocacy, research, and education activities in order to find other ways to hold industry accountable for the adverse impacts on the community's health, well-being and environment and to get the industry to change the

practices which cause the harms that the legal remedy for nuisance is uniquely designed to address.

31. If REACH were not forced to divert resources in this manner, it would be able to put its resources towards other pressing needs.

**c. Waterkeeper Alliance**

32. Plaintiff Waterkeeper Alliance, Inc. ("Waterkeeper Alliance") is a not-for-profit corporation organized under the laws of the State of New York and is a tax-exempt charitable corporation under section 501(c)(3) of the Internal Revenue Code.

33. Waterkeeper Alliance's mission is to hold polluters accountable in order to preserve and protect natural waterways and watersheds.

34. Waterkeeper Alliance currently connects 43 Waterkeeper organizations and affiliate organizations in 44 countries on 6 continents. This network includes Basinkeepers, Baykeepers, Bayoukeepers, Canalkeepers, Channelkeepers, Coastkeepers, Creekeepers, Inletkeepers, Lakekeepers, Riverkeepers, Shorekeepers, Soundkeepers, and Waterkeepers chartered and licensed by Waterkeeper Alliance in the United States ("U.S. Member Organizations"). The 176 U.S. Member Organizations cumulatively have tens of thousands of individual dues-paying and voting members that live, work and recreate on waterways and in watersheds across the United States. Each Member Organization through its Member Representative participates in the Waterkeeper Alliance's decision-making and setting Waterkeeper Alliance's policies.

35. In North Carolina, there are currently 16 Waterkeeper Alliance affiliates with members who live, work, recreate on, and obtain their drinking water from waterways and in watersheds in North Carolina.

36. HB 467 and SB 711 directly harm Waterkeeper Alliance affiliates' individual members, many of whom have lost the right to bring a nuisance action against neighboring IHOs due to this legislation. Even if some members may still be able to bring an action, they will not do so because their legal costs would likely exceed the amount of damages they are now able to recover.

37. Waterkeeper Alliance has invested significant time and resources to protect the use and enjoyment of affiliate members' private property against pollution from industrial animal agriculture.

38. Waterkeeper Alliance has an interest in the specific remedies available in nuisance claims, including remedies for the loss of use and enjoyment of property, because they are the most effective legal means to hold industrial animal agricultural polluters accountable and deter the industry from continuing its harmful practices. Waterkeeper Alliance has pursued these remedies on behalf of Waterkeeper members in the past and would continue to do so were it not for the passage of HB 467 and SB 711.

39. HB 467 and SB 711 frustrate Waterkeeper Alliance's mission and force it to divert its resources away from its core mission and planned monitoring, advocacy, research, and education activities in order to find other ways to hold industrial animal agricultural polluters accountable for their pollution, to protect and preserve North Carolina's waterways, and to get the industry to change the practices which cause the

harms that the legal remedy for nuisance is uniquely designed to address. Waterkeeper Alliance continues to spend resources to combat the effects of these laws, and to advocate for its affiliate members.

40. On an ongoing basis, Waterkeeper Alliance engages in education efforts to inform members in North Carolina about their loss of rights due to the passage of HB 467 and SB 711. Waterkeeper Alliance is also spending time and resources to help its affiliates' members who would have private nuisance claims against industrial animal operations to find other ways to protect their rights and interests given the limitation of nuisance remedies caused by the enactment of HB 467 and SB 711.

41. If Waterkeeper Alliance were not forced to divert resources in this manner, it would be able to put its resources towards other pressing needs.

*d. Winyah Rivers Alliance*

42. Winyah Rivers Alliance ("WRA") has been a licensed member of the Waterkeeper Alliance since 2002.

43. Through its Waccamaw and Lumber Riverkeeper programs, WRA watches over the watersheds in the Lower PeeDee Basin, a drainage area of 11,700 square miles that includes the Waccamaw, Lumber, Little PeeDee, Lower PeeDee, Lynches, Black and Sampit Rivers. Collectively this is referred to as the greater Winyah Bay watershed because all rivers ultimately discharge into Winyah Bay at Georgetown, South Carolina. Winyah Bay is the third largest estuary on the Eastern Seaboard.

44. WRA's mission is to protect and improve the water quality of the Lower PeeDee River Basin through education, advocacy, and action. WRA seeks to ensure that the land and water uses support a high quality of life for all human and natural uses.

45. WRA is a not-for-profit, membership-based corporation organized under the laws of the State of South Carolina and is a tax-exempt charitable corporation under section 501(c)(3) of the Internal Revenue Code.

46. WRA currently has approximately 500 members, many of whom live, work, recreate on, and obtain their drinking water from waterways and in watersheds in North Carolina. WRA includes members who live on and/or own property impacted by pollution from industrial animal operations.

47. All WRA members pay annual dues. Decisions of the organization are made by WRA's Board of Directors.

48. WRA has invested significant time and resources to protect the use and enjoyment of private property against pollution from industrial animal operations.

49. WRA meets with landowners to discuss the impacts of industrial animal agriculture and to learn more about nuisance conditions and property rights; conducts educational programming focused on the impacts of industrial animal agriculture; reports and provides video and photographic evidence of suspected permit and regulatory violations to the North Carolina Department of Environmental Quality; and collects surface water quality samples to assess the degree of those impacts and pays for the analysis of such samples at state-certified labs.

50. HB 467 and SB 711 eliminated WRA's members' ability to pursue nuisance remedies against IHOs.

51. WRA has an interest in the specific remedies available in nuisance claims, including remedies for the loss of use and enjoyment of property, because they are the most effective legal means to hold industrial animal agriculture polluters accountable and deter the industry from continuing its harmful practices.

52. HB 467 and SB 711 frustrate WRA's mission and force it to divert resources away from its core mission and planned monitoring, advocacy, research, and education activities in order to find other ways to hold industrial animal operations accountable for their pollution, to protect and preserve North Carolina's waterways, and to get the industry to change the practices which cause the harms that the legal remedy for nuisance is uniquely designed to address. WRA continues to spend resources to combat the effects of these laws, and to advocate for its members.

53. While the General Assembly was considering these bills, WRA diverted resources to educate its members and the public about HB 467 and SB 711's adverse impacts on both property rights as well as the ability to hold the industry accountable for its pollution of the lower PeeDee basin and its watersheds.

54. Since the enactment of HB 467 and SB 711, WRA has continued to divert resources to meet with members to present information and answer questions about HB 467's restriction on nuisance damages and SB 711's restrictions on when nuisance actions can be brought. WRA has also worked with members deprived of meaningful nuisance

remedies to evaluate alternative means of holding industrial agricultural operations accountable for harm they cause.

55. HB 467 and SB 711 frustrate WRA's mission and force the organization to continue to divert its limited resources away from its other core activities. If WRA were not forced to divert resources in this manner, it would have been able to put its resources towards other pressing needs, particularly in the wake of the hurricanes that devastated many of its members' homes in 2018.

***e. Defendants***

56. Defendant State of North Carolina ("the State") is a sovereign state of the United States of America. The State, through the General Assembly, enacts local and general legislation, including HB 467 and SB 711.

57. Defendant Timothy K. Moore is the Speaker of the North Carolina House of Representatives and is being sued in his official capacity. Pursuant to Rule 19(d) of the North Carolina Rules of Civil Procedure, Speaker Moore is a necessary party to this constitutional challenge to a state statute, as he is an agent of the State through the General Assembly.

58. Defendant Philip E. Berger is the President Pro Tempore of the North Carolina Senate and is being sued in his official capacity. Pursuant to Rule 19(d) of the North Carolina Rules of Civil Procedure, President Pro Tem Berger is a necessary party to this constitutional challenge to a state statute, as he is an agent of the State through the General Assembly.

### **III. JURISDICTION AND VENUE**

59. Pursuant to N.C. Gen. Stat. § 7A-245(a), this Court has jurisdiction over this action, which authorizes civil actions in the Superior Court for “[t]he enforcement of declaration of any claim of constitutional right,” for “[i]njunctive relief against the enforcement of any statute,” and for “[d]eclaratory relief to . . . disestablish the validity of any statute.”

60. Pursuant to N.C. Gen. Stat. § 1-253, this Court has authority to grant the declaratory judgments and injunction sought.

61. Pursuant to N.C. Gen. Stat. §§ 1-81.1(a1), 1-267.1(a1) and 1-267.1(b2), and Rule 42(b)(4) of the North Carolina Rules of Civil Procedure, the Superior Court of Wake County is the proper venue for this challenge.

### **IV. FACTUAL ALLEGATIONS**

#### **A. North Carolina Nuisance Law**

62. The origin of nuisance actions can be traced to *Williams Aldred's Case*, in which, in 1611, the English Court of the Kings Bench recognized an action “for erecting a hogstye so near the house of the plaintiff that the air thereof was corrupted.”

63. Even before the first North Carolina Constitution was enacted, North Carolina courts recognized that nuisance actions allow a plaintiff to recover for another’s harm to plaintiff’s ability to use or enjoy the plaintiff’s property and could be pursued against agricultural facilities.

64. In 1979, the original North Carolina Right to Farm law was passed, which codified an affirmative “coming to the nuisance” defense recognized at common law. It

was designed to protect farmers by discouraging nuisance suits by landowners who moved in next to pre-existing farms.

65. The law remained unchanged until more than 400 plaintiffs—almost all of whom are African American—filed nuisance actions against Murphy-Brown, LLC, a subsidiary of Smithfield, challenging the adverse impacts of nearby IHOs on their right to use and enjoy their property. *See, e.g.*, Complaint at 1, *Alderman v. Smithfield Foods, Inc.*, No. 13-CV-10322 (N.C. Super. Ct. July 30, 2013). Most of those cases were re-filed in federal court in 2014.

66. Those plaintiffs included lifelong residents of the properties neighboring Smithfield-controlled operations. Some of the plaintiffs can trace back their family's ownership of their current properties over a century or more, and some of the plaintiffs are REACH members.

67. Those plaintiffs waived their right to recover for their lost property value, seeking exclusively to be compensated for the physical, emotional, and personal harms from the loss of the use and enjoyment of their property caused by Smithfield-controlled operations.

68. Beginning in 2017, after the federal court ruled that the nuisance claims against Smithfield could proceed to trial and continuing through the multiple jury verdicts against the company in 2018, Smithfield lobbyists and state legislators who have received substantial financial contributions from the corporation worked to immunize Smithfield from nuisance liability by amending North Carolina's "Right to Farm" law through HB 467 and SB 711.

**B. HB 467 and SB 711 were introduced to protect Smithfield from pending nuisance suits.**

**i. HB 467**

69. The legislative history of HB 467 and SB 711 makes clear that they were designed to shield Smithfield from the above-referenced pending nuisance suits.

70. On March 23, 2017, following the denial of a motion to dismiss the nuisance suits, HB 467 was introduced to limit plaintiffs' nuisance damages to lost property value only.

71. Plaintiffs in the pending nuisance actions had specifically waived their right to recover those damages.

72. The bill also provided that its restrictions on nuisance damages would apply retroactively, and specifically to the *pending* lawsuits.

73. The bill's sponsors and supporters in the legislature sought to resolve the pending cases in favor of Smithfield by only allowing recovery of the type of damages the plaintiffs in those suits had waived.

74. Representative Davis, a sponsor of the legislation, explained that HB 467 solely restricted nuisance damages, "because that's what the plaintiffs are using . . . to recover damages. They're not bringing anything else."

75. Representative Reives responded that he understood Representative Davis to mean "this legislation is about that particular suit" against Smithfield's industrial hog facilities.

76. Representative Quick likewise explained that based on Representative Davis's statement, he was compelled to conclude the bill would have "discriminatory impact, because the plaintiffs [in the Smithfield nuisance actions] are predominately African-American."

77. Representative Blackwell lamented that the bill was "a law specially designed to favor a single defendant at the expense of whatever the common law rights of those 500 and some plaintiffs are."

78. As HB 467 progressed through committees, Representative Dixon, another sponsor of the bill, defended it based on how he assessed the merits of the nuisance claims against Smithfield, stating that plaintiff's "allegations are at best exaggerations and at worst outright lies" and thus did not deserve compensation, so the legislature would prevent their recovery.

79. In response, Representative Blackwell opined that the bill's focus on nuisance damages was a result of Smithfield being "worried about losing" the pending case and thus the legislature was attempting to "pull [Smithfield's] chestnuts out of the fire."

80. Representative Speciale stated the legislation was "singl[ing] out" a "specific court case" for action and spoke against the bill's application to a single industry by stating, "If we're going to change the law and we're going to limit compensatory damages or whatever it is we're doing here, then we need to do it for everybody . . .".

81. Likewise, Representative Blust stated the legislature was "rushing in to bail out a defendant. . . . that's what's happening."

82. Referencing the pending nuisance actions, Rep. Blust continued, “I don’t know why . . . the plaintiffs, that they would not seek damages for diminution in value. . . . [T]he defendant’s here asking us to take away all other damages that have been recognized by courts for these type actions. I just don’t think that’s a good thing for us to do.”

83. Representative Blust continued that the hog industry has “a very romantic, very sympathetic group of figures but we all know that much of the agriculture today because of economies of scale and equipment, is no longer your family farmer, although many do exist. These are giant hog operations that do have environmental consequences that they just do.”

84. HB467 passed the House and was presented to the state Senate.

85. The Senate ultimately revised the bill so that it would only apply to future nuisance actions.

86. Senator Bryant explained that, even with the retroactivity provision removed, HB 467 would insulate Smithfield from “the cause of action, the claim for damages that was in the swine farm nuisance litigation that stimulated this—the need for this legislation.”

87. The Senate likewise heard testimony in support of the bill from the CEO of the North Carolina Pork Council, who confirmed that it saw the legislation as a response to the financial “uncertainty” created by the ongoing litigation and championed the law’s passage to ensure that IHOs such as Smithfield’s know for the future “what are the damages” to which they could be exposed.

88. Representative Dixon, speaking to the Senate, again asserted that the bill's limits on damages were necessary because the plaintiffs' claims in the pending nuisance suits are "at best enormous exaggerations and at worst outright lies," so they should never be allowed to recur and, at the very least, the legislature should prevent any similar recovery in the future.

89. After the Senate passed the bill, Governor Cooper vetoed the legislation, stating "Special protection for one industry opens the door to weakening our nuisance laws in other areas which can allow real harm to homeowners, the environment and everyday North Carolinians."

90. Five days later the North Carolina legislature overrode the Governor's veto and HB 467 became law, codified at N.C. Gen. Stat. § 106-702, on May 11, 2017.

91. HB 467 was expressly limited to agricultural and forestry operations; it does not restrict the damages in nuisance actions against any other industry or individual.

92. Under HB 467, none of the other damages traditionally awarded to plaintiffs in a nuisance action—including for personal discomfort, inconvenience, annoyance, loss of enjoyment, injury to health, and mental distress—are available to plaintiffs bringing an identical claim against an agricultural or forestry operation.

93. HB 467 also provides that if a "successor in interest" to a property owner who previously brought a successful private nuisance action "brings a subsequent private nuisance action" against that same "agricultural or forestry operation," even if it is for a different harm, "the combined recovery from all such actions shall not exceed the fair market value of [the] property."

94. HB 467 ensures that, in total, over its entire operation, an agricultural operation causing a nuisance will never be liable for more than the property value of its neighbors' property, regardless of how many, what sorts, or the severity of the nuisances it creates, or how long those nuisances persist.

95. HB 467 also conditions the availability of punitive damages on the existence of "a criminal conviction or a civil enforcement action taken by a State or federal environmental regulatory agency pursuant to a notice of violation for the conduct alleged to be the source of the nuisance within the three years prior to the first act on which the nuisance action is based."

ii. **SB 711**

96. On April 26, 2018, the jury in the first nuisance trial against Smithfield issued a \$50.75 million verdict, which was later reduced to \$3.25 million under the state law capping punitive damages.

97. SB 711 was filed just three weeks later, on May 16, 2018.

98. During a Senate discussion of SB 711, Senator Brent Jackson (one of the bill's sponsors) stated that "the latest court ruling is why I am so passionate about this bill."

99. During the floor debate on SB 711, Representative Blust stated that "The act itself it was about that lawsuit. That verdict was entered on April 26 and then we're here by early June with supposedly a legislative fix."

100. In addition to the specific restrictions on nuisance claims and property rights, SB 711 also contains a series of "whereas clauses" that make explicit that it was based on the existing circumstances in the lawsuits against Smithfield.

101. SB 711's "whereas" clauses also demonstrate that it is not based upon substantial distinctions between the class of North Carolinians it deprives of the nuisance remedy and the class that retains the right to sue for nuisance.

102. On June 25, 2018, Governor Cooper vetoed SB 711. His veto message recognized that "property rights are vital to people's homes. . . . North Carolina's nuisance laws can help allow generations of families to enjoy their homes and land without fear for their health and safety. . . . Our laws must balance the needs of business versus property rights. Giving one industry special treatment at the expense of its neighbors is unfair."

103. The North Carolina legislature overrode the Governor's veto on June 27, 2018 and enacted SB 711, N.C. Sess. Law 2018-113, in relevant part codified at N.C. Gen. Stat. §§ 106-701 and 106-702 (2018).

104. SB 711 prohibits nuisance lawsuits against an agricultural operation unless: (1) the injured property is within one half mile of the source or structure causing the nuisance; and (2) the operation is less than a year old or undergoes a "fundamental change" which does not include a change in the farms' ownership, size, technology, or product. If an operation undergoes a "fundamental change," any suit must be brought within a year of that fundamental change.

105. SB 711 also establishes the statute of limitations for filing a claim against an agricultural operation not by the inception of the nuisance, but rather from establishment of the operation.

106. An operation that begins to cause a nuisance 366 days from its opening is immune from suit under this provision.

107. SB 711 also strikes N.C. Gen. Stat. § 106-701(a2), which excluded “negligent or improper” agricultural or forestry operations from the law’s exemption from nuisance liability.

108. This change allows an IHO to operate negligently without any consequence in nuisance law.

109. SB 711 eliminates the clause in N.C. Gen. Stat. § 106-701(d) which permitted a local government to determine whether a negligent forestry or agricultural operation is creating a nuisance and provide for the nuisance’s abatement.

110. SB 711 renders null and void any local government regulation or suit for nuisance abatement against any agricultural or forestry operation—even a negligent one.

111. HB 467 and SB 711 upend nuisance law, empowering agricultural and forestry operations to disregard their impacts on their neighbors because the laws ensure they will almost never be subject to nuisance liability and if they are, such liability will be severely limited.

112. There is no legitimate basis to insulate only agricultural and forestry operations from nuisance claims in this unreasonable way. Existing nuisance law jurisprudence adequately protects non-nuisance creating operations from frivolous litigation and preserves constitutional property rights.

**C. North Carolina industrial animal operations generate extensive, costly nuisances that well exceed what is recognized under HB 467 and SB 711.**

113. HB 467 and SB 711 allow IHOs to impose costs on rural communities and property owners well in excess of compensation North Carolina law currently allows.

114. The damages to nearby residents' property rights caused by industrial animal agricultural operations often far exceed diminution of land value.

115. The negative effects from these operations, including the stench from both stagnant and sprayed waste, are experienced miles away and adversely impact the quality of life for impacted residents.

116. In over 2,000 IHOs in North Carolina collectively housing around 9 million hogs, the animals are crammed into large containment buildings. Each IHO typically has between two and ten such buildings.

117. In order to maximize the amount and speed of weight gain, the animals live their entire lives inside the buildings, standing on slotted floors through which their feces, urine, and other waste fall to collect in a storage pit underneath the building.

118. The hogs typically produce between 4,500 to 15,000 gallons of hog feces and urine per building each day.

119. This volume of daily waste inside a relatively small space produces noxious gases and odors that must be expelled from the buildings by large ventilation fans.

120. The gases and particulates emitted from the containment facilities can travel for miles and redeposit in the community, onto and inside homes and on land and water.

121. The feces, urine, and feed waste from the containment facility are periodically flushed into nearby open, football field-sized pits which the industry calls "lagoons."

122. Anaerobic bacteria break down the manure in the lagoons, producing ammonia and hydrogen sulfide, as well as other toxic and odorous gases that are released into the air, particularly when the manure in the lagoon is agitated, which is part of regular lagoon maintenance.

123. Gases and particulate from the lagoon can travel for miles and redeposit on land and water.

124. To discard the waste created through hog production, and to prevent the lagoons from overflowing before weather events, liquid sewage is regularly sprayed on surrounding fields, resulting in additional release of noxious gasses, odors, and particulates.

125. Liquid waste can be applied from the lagoons to surrounding fields in a variety of manners, but the most common is through a center pivot irrigation system that sprays waste—and its odors and particulates—into the air.

126. Some of that liquid waste volatilizes into the atmosphere where it can redeposit onto and inside homes, land and water far from the intended application field.

127. Neighbors receive no advance warning when industrial hog operations will choose to spray waste.

128. When the liquid hog waste is sprayed onto the application fields, the spray can also run off onto neighboring properties or into surrounding surface waters traveling throughout the state.

129. North Carolina's Department of Environmental Quality (DEQ) has noted that IHOs' land applications are direct conveyances for the highly nutrient-laden water to surface waters.

130. Hog waste runoff into surface waters negatively impacts the environment, fish, and wildlife.

131. Contaminants in the waste, including harmful fecal bacteria and nitrates, also leach into the groundwater and then flow into the nearby wells that draw from that same aquifer for drinking water and other domestic uses, such as bathing and preparing food.

132. IHOs also harm their neighboring communities by placing numerous hog carcasses near public roads in so-called "dead boxes."

133. The dead boxes are not only horrible to see when they are full of carcasses, but they are also a source of stench and noxious gases and particulate matter released into the community, including hydrogen sulfide ammonia, endotoxins, bacteria, yeasts, molds and other respiratory irritants.

134. Other harms flow from the IHOs to nearby residents and their property from the trucks carrying hog carcasses and other chemicals through the community, spreading noxious gasses and particulate matter.

135. Epidemiological research reveals North Carolina residents living near industrial hog operations suffer disproportionately from acute blood pressure, wheezing, asthma, headaches, muscle aches, burning eyes, stress, anxiety, anemia and interrupted sleep.

136. A 2005 study of residents within 1.5 miles of IHOs in North Carolina's Duplin and Sampson counties found increased respiratory, sinus, and nausea problems, as well as higher levels of psychological distress.

137. Researchers have established a link between higher rates of asthma symptoms in children and who attend schools near industrial hog operations.

138. A 2006 survey of North Carolina schoolchildren correlated rates of wheezing to the children's proximity to IHOs. Children attending schools within 3 miles of those operations were at the highest risk.

139. Research also indicates neighbors of IHOs are more likely to be exposed to antibiotic resistant bacteria.

140. Antibiotic-resistant genes traced to the hogs have been found in the groundwater that makes its way into the community's wells.

141. Scientists have also established such drug-resistant bacteria from these confined hogs, including Methicillin-resistant *Staphylococcus aureus* (MRSA), can be transmitted to humans.

142. This is significantly more likely with industrial facilities because so many animals are crammed into close quarters and often fed sub-therapeutic levels of antibiotics to aid their growth and fight off the diseases to which they are exposed.

143. Receiving sub-therapeutic levels of antibiotics makes the animals more likely to develop MRSA.

144. Workers within such operations are therefore also more likely to be exposed to MRSA.

145. Pig-specific MRSA strains have been reported among IHO workers, who can in turn transmit the MRSA to their families and the community where they reside.

146. Researchers have also found that exposure to low levels of hydrogen sulfide like that released from the manure pits, lagoons, and application fields can cause neurological damage in humans.

147. The Research Triangle Institute reported that the health effects (including deaths) caused by the ammonia released from industrial hog operations alone results in the loss of hundreds of millions of dollars each year in North Carolina.

148. In September 2018, the North Carolina Medical Journal published research further documenting the increased risk of serious health conditions suffered by residents living within three miles of IHOs in North Carolina.

149. The study compared communities with the highest concentration of hog operations to those without such operations (but similar in all other respects) and found there were 30% more deaths among patients with kidney disease, 50% more deaths among patients with anemia, and 130% more deaths among patients with a blood bacterial infection in communities near concentrated hog operations. These communities also experience greater risk of infant mortality and lower birth weights.

150. This study also highlighted that North Carolina is unique among hog producing states because of its concentration of IHOs in the southeastern part of the state; the average number of hogs per operation (much higher than in Iowa or Minnesota, the next 2 leading states for industrial swine production); and the population density in

southeastern North Carolina, which exposes greater number of nearby residents and communities to the adverse health impacts of IHOs.

151. Because of the odors and health risks from the waste, residents near industrial animal agriculture facilities (both swine and chicken) are compelled to alter their lives and land uses.

152. Neighbors typically keep their doors and windows closed, even investing in additional seals and coverings to keep out the outside air.

153. They often are unable to spend time out of doors on their property or use their outdoor property for gardening or recreational purposes whenever the stench and other pollution from the nearby IHOs are present.

154. At great personal expense, they are also forced to alter how they obtain and filter their drinking water.

155. Neighbors also cannot use their homes to engage in business or entertain visitors or guests.

**D. The injuries created by North Carolina industrial animal agriculture facilities are disproportionately borne by the state's historically low-wealth and non-white communities.**

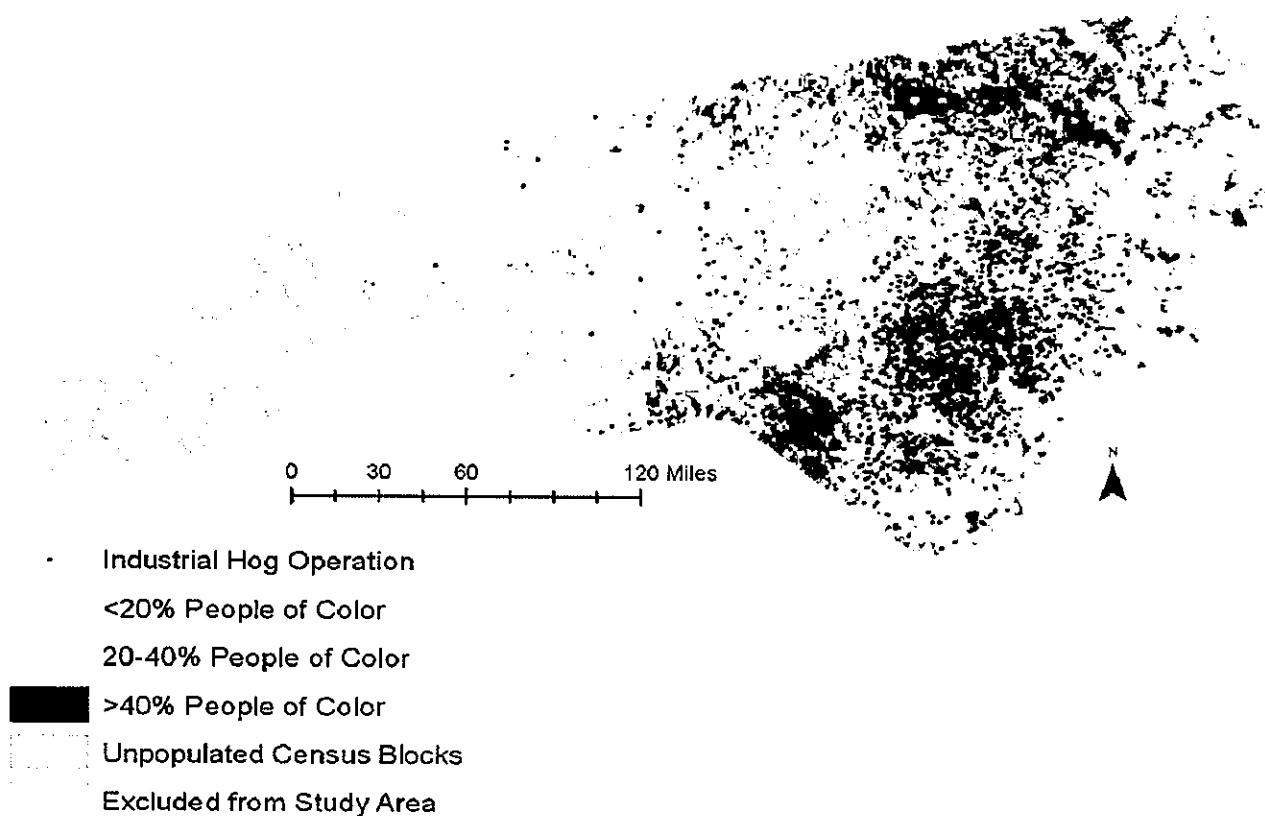
156. The risks and burdens of living near IHOs are disproportionately borne by North Carolina residents who, because of their race and ethnicity, have historically been and are still discriminated against, making the additional burdens these facilities impose even more harmful.

157. Native Americans in North Carolina are 2.18 times more likely than whites to live within three miles of an industrial hog operation.

158. African Americans in North Carolina are 1.54 times more likely than whites to live within three miles of an industrial hog operation.

159. Latinos in North Carolina are 1.39 times more likely than whites to live within three miles of an industrial hog operation.

160. As shown in the following figure, industrial hog facilities are clustered in North Carolina communities of color.



161. There are over seven times more IHOs in North Carolina communities with above-average percentages of low-wealth and non-white residents than there are in wealthier, white communities.

162. These residents have the least power in North Carolina's political system to advocate for themselves and their communities.

163. In response to a 2014 Title VI civil rights complaint filed by Plaintiffs NCEJN, REACH and Waterkeeper Alliance against DEQ for the discriminatory effects of its swine General Permit and oversight of industrial swine operations, the EPA stated it had "grave concerns" that North Carolina's permitting of IHOs violates federal civil rights law.

164. HB 467 and SB 711 increase and entrench this discrimination by depriving disproportionately non-white residents of their property rights.

**E. Plaintiffs' members have suffered harms from nuisance caused by industrial animal agriculture.**

165. Devon Hall helped to found REACH in 2002 and is currently REACH's Program Manager and Interim Director. Like his fellow REACH members, Mr. Hall pays yearly dues to the organization, participates in regular monthly meetings, and votes on decisions that affect and further REACH's mission. Mr. Hall is African American and has lived at the home he currently owns near Kenansville, Duplin County, North Carolina for more than 35 years.

166. Mr. Hall's home and the REACH office where he works are about a mile apart. There are at least thirty industrial animal operations within three miles of his home

and the REACH office, all of which were built after Mr. Hall purchased his home, but more than a year ago.

167. Mr. Hall lives with terrible odors from the hog and poultry operations near his home and office. Additionally, he suffers odors and other pollution from the trucks that haul the hogs around, including trucks filled with dead hogs that routinely pass by his home.

168. The smell from the hog and poultry operations gets into Mr. Hall's clothes, hair, car, and home.

164. Mr. Hall regularly convenes community meetings at the REACH office. Although serving a meal as part of a community meeting is a deep tradition, oftentimes the stench from the hog and poultry facilities makes it impossible to eat or even cook outside.

165. Before the proliferation of industrial animal operations in his community, Mr. Hall enjoyed regular outdoor cookouts with his family. He has a large family; he is one of seven siblings, with many nieces and nephews, all of whom live in Duplin County. Mr. Hall installed a heavy-duty picnic table in his yard to enjoy family reunion cookouts.

166. However, the flies and the stench from the surrounding industrial animal agriculture operations oftentimes drive these reunions indoors. Mr. Hall is unable to use and enjoy his property in ways that are important and meaningful to him because of the nuisances from surrounding industrial animal operations.

167. Mr. Hall and his family have been on county water for about 18 years. They were on well water before that. Mr. Hall pays for county water and will not go back to

using well water because there are so many IHOs nearby which are contaminating surface waters and may be contaminating groundwater, including the aquifer for the Halls' private well.

168. The outreach that Mr. Hall has done and the research he has read and participated in have made him more concerned about the negative health impacts that industrial animal agriculture facilities bring to his community.

169. Mr. Hall experiences industrial animal operation proliferation and pollution in eastern North Carolina as an injustice to people of color. He believes that communities of color have been targeted because the industry and power structure it influences assume that low-wealth communities of color cannot pull together to fight that injustice.

170. Mr. Hall also believes that HB 467 and SB 711, like many state laws passed before them, are designed to undermine the property rights of residents living near industrial animal operations and protect and further the industry's interests, regardless of their adverse effect on the health, well-being, and quality of life of low-wealth people of color.

171. Mr. Hall is unable to bring a nuisance suit to prevent the harm to his and his family's use and enjoyment of their property because of HB 467 and SB 711's restrictions on his rights.

172. Jessie Jarmon is another member of REACH. He is also African American.

173. Other than a twenty year stretch when he served in the U.S. Army, Jessie Jarmon has always lived on Dark Branch Road near Kenansville, in Duplin County, North Carolina. His brother and uncle also live there on the family property.

174. There are eight permitted industrial animal operations within a mile of Mr. Jarmon's property and twenty-six such operations within three miles of his property, all of which were built after Mr. Jarmon and his family began living on their property.

175. Mr. Jarmon's property abuts a hog manure sprayfield from one of those facilities, and every six months or so, the jet sprayer will come up to his property line and spray hog waste, creating an unbearable stench.

176. Mr. Jarmon has two adult daughters. When his daughters visit, they often complain about the hog operation odors. He travels to see them but wishes they could enjoy being with him where he grew up and owns property.

177. The smell from surrounding industrial animal operations also affects how Mr. Jarmon can use and enjoy his property. He cannot have or enjoy cookouts on his property, or even sit outside on his porch and enjoy clean air, because of the stench and the flies.

178. Mr. Jarmon is concerned about what these facilities are spraying into the air and water near his home, and the effects that waste has on his and his family members' health.

179. Mr. Jarmon is unable to bring a nuisance suit to protect his and his family's fundamental right to use and enjoy their property because of the passage of HB 467 and SB 711.

180. Rodney Brady has been a WRA member since 2019. Mr. Brady, who is 53 years old, was born and raised in the Exum Community in Brunswick County, North

Carolina, and has lived there all his life. He lives with his wife on land he inherited from his mother in the early 1990s.

181. There are two permitted industrial animal operations within a mile of the Brady home and three permitted industrial animal operations within three miles of the Brady home.

182. The odor and particulate matter pollution from those operations is so bad when the wind is blowing from any of them that the Bradys cannot hang their clothes out on the line to dry, enjoy their porch, or otherwise use and enjoy their property.

183. Flies and other vermin have also interfered with the Bradys' use and enjoyment of their home since the IHOs moved into their community.

184. It embarrasses Mr. Brady to tell people he lives near those operations, because of the awful stench, flies, buzzards, "dead boxes" and trucks hauling dead and live hogs.

185. From his front porch, Mr. Brady can see the spot where he used to build forts as a young boy, but he cannot be out on that porch when the hog operations are spraying waste because of the resulting horrible odor.

186. The Bradys are on well water, and fear that the surrounding hog operations are polluting their drinking water.

187. Mr. Brady has made multiple complaints to DEQ regarding waste spraying during rain events, resulting in ponding and runoff into surface waters, but on information and belief those complaints resulted in few if any consequences for the facility operators or changes in swine waste disposal.

188. Mr. Brady is concerned about what these industrial facilities are spraying into the air and water near his home, and the effects that waste has on his and his family's health.

189. Mr. Brady is unable to bring a nuisance suit to protect his and his family's fundamental right to use and enjoy their property because of the passage of HB 467 and SB 711.

### **CLAIMS FOR RELIEF**

#### **FIRST CLAIM FOR RELIEF** **Article II, Section 24 of the North Carolina Constitution.** **(Prohibition of Special Laws)**

190. Plaintiffs re-allege and incorporate by reference all the allegations set forth above.

191. Article II, Section 24 of the North Carolina Constitution prohibits "local, private, or special" laws "[r]elating to health sanitation, and the abatement of nuisances." N.C. Const. art. II, § 24(1)(A).

192. Special laws are those made for individual cases; particular individuals, associations or corporations; or for "a special class or favored few." *State v. Kelly*, 186 N.C. 365, 379, 119 S.E. 755, 763 (1923).

193. To determine whether legislation is "special," the court examines the classifications of residents created by the law and must determine whether the persons or things subject to the law are reasonably different from those excluded.

194. Because HB 467 and SB 711 deprive a specific class of residents of their nuisance remedies, and because the deprived class is not reasonably different from all other residents who suffer from nuisances, HB 467 and SB 711 are “special laws.”

195. In addition to scrutinizing whether there are legitimate differences between the people subjected to and excluded by HB 467 and SB 711’s restrictions, to determine whether their classifications are reasonable, the court also examines whether they are germane to the laws’ purpose, are based upon existing circumstances only and apply uniformly to all members of the classification.

196. Depriving residents of their nuisance remedies against agricultural and forestry operations is not reasonably related to the laws’ declared purpose of preventing “frivolous nuisance lawsuits,” particularly where the common law nuisance remedy has built-in protections against frivolous claims, where N.C. Rule of Civ. Proc. 11 prohibits and penalizes those who bring frivolous claims, and where the plaintiff bears the burden of proving nuisance and damages before a jury.

197. The overbroad elimination of residents’ nuisance remedies against agricultural and forestry operations does not reasonably further the laws’ declared purpose to “make plain [the General Assembly’s] intent that existing farms and forestry operations in North Carolina that are operating in good faith be shielded from nuisance lawsuits filed long after the operations become established.” That “shield” was established by the legislature’s 1979 codification of the “coming to the nuisance” affirmative defense.

198. HB 467 and SB 711 are based upon existing circumstances only.

199. The express purpose of the legislation is to address "a [recent] federal trial court['s]" interpretation of North Carolina's Right to Farm Act.

200. The restrictions on residents harmed by agricultural or forestry operations in SB 711 also do not apply uniformly to all members of that class, but only to members living more than one-half mile from such operations.

201. These laws were adopted in response to a specific case and to existing circumstances at the time of their passage and designed to protect a special class or favored few.

202. HB 467 and SB 711 are special laws that by their plain text relate to health, sanitation, and the abatement of nuisances, and therefore violate N.C. Const. Article II, Section 24 and should be declared unconstitutional and void.

**SECOND CLAIM FOR RELIEF**  
**Article I, Section 19 of the North Carolina Constitution**  
**(Law of the Land)**

203. Plaintiffs re-allege and incorporate by reference all the allegations set forth above.

204. Article I, Section 19 of the North Carolina Constitution provides, "No person shall be taken, imprisoned, or disseized of his freehold, liberties, or privileges, or outlawed, or exiled, or in any manner deprived of his life, liberty, or property, but by the law of the land. . . . nor shall any person be subjected to discrimination by the State because of race, color, religion, or national origin."

205. The “law of the land” clause prohibits governmental infringement on a person’s fundamental rights to life, liberty and property when such infringement violates due process requirements.

206. The constitutional right to property includes the right to possess, use and enjoy that property.

207. The right to use and enjoy property is protected by the ability of a property owner to bring a common law nuisance claim against others who interfere with or prevent the owner’s ability to use and enjoy their property.

208. HB 467 and SB 711 deprive certain North Carolinians of a fundamental property interest.

209. No additional process or cause of action other than the common law tort of nuisance suffices to protect property owners’ rights to use and enjoy their property free from substantial and unreasonable interference.

210. Due process requires that the State may only exercise its police power to infringe on a person’s property rights in good faith; that such infringement have appropriate and direct connection to the protection of the public health, safety and welfare; and that the means employed by the State to achieve its legitimate purpose be reasonable.

211. The deprivation of property rights caused by HB 467 and SB 711 violates due process because it exceeds the permissible scope of the State’s police powers.

212. These statutes were adopted with an improper purpose and should therefore be declared unconstitutional.

213. Even if the State's purpose were a permissible one however, the means established by these statutes to achieve that purpose violate due process.

214. HB 467 deprives Plaintiffs of due process by restricting the full range of remedies necessary to protect the constitutional right to property.

215. SB 711 deprives Plaintiffs of due process by eliminating their ability to protect their constitutional property rights through the common law nuisance cause of action.

216. By depriving Plaintiffs of their fundamental right to use and enjoy their property, HB 467 and SB 711 violate the due process provisions of Article I, Section 19, and should be declared unconstitutional.

**THIRD CLAIM FOR RELIEF**  
**Article I, Section 25 of the North Carolina Constitution**  
**(Right to Trial by Jury)**

217. Plaintiffs re-allege and incorporate by reference all the allegations set forth above.

218. Article I, Section 25 of the North Carolina Constitution states that "In all controversies at law respecting property, the ancient mode of trial by jury is one of the best securities of the rights of the people, and shall remain sacred and inviolable."

219. It codifies the principle, pre-dating North Carolina's first constitution, that the right to a jury trial is one of the safeguards of the liberties of the people and essential to the equitable administration of justice.

220. Private nuisance actions against agricultural facilities for interfering with their neighbors' use and enjoyment of their land have been recognized in North Carolina at least as early as 1843.

221. Throughout North Carolina's history, the amount of damages necessary to compensate for a private nuisance has been a question put to the jury.

222. HB 467 violates North Carolina Constitution Article I, Section 25 by taking away from the jury the historically recognized right to determine damages in private nuisance actions.

223. HB 467 works an even greater harm to successors in interest, because it may entirely remove the jury's ability to award any damages if a previous owner has already recovered the diminution in land value.

224. HB 467 further violates the right to a jury trial by limiting the availability of punitive damages to those cases where an executive branch agency has first made a determination of liability through "a criminal conviction or a civil enforcement action."

225. HB 467 has substituted the judgment of the legislature for a determination that the North Carolina Constitution has expressly reserved for a jury.

226. By depriving plaintiffs of their fundamental right to trial by jury, HB 467 violates Article I, Section 25, and should be declared unconstitutional.

#### **PRAYER FOR RELIEF**

227. Plaintiffs request that the court enter a judgment:

- a. Declaring HB 467 unconstitutional on its face under Article II, Section 24, Article I, Section 19, and Article I, Section 25;

- b. Declaring Section 10 of SB 711, N.C. Sess. Law 2018-113 (codified at N.C. Gen. Stat. §§ 106-701 and 106-702 (2018)) unconstitutional on its face under North Carolina Constitution Article II, Section 24 and Article I, Section 19;
- c. Permanently enjoining the operation and enforcement of HB 467 and Section 10 of SB 711, in their entirety;
- d. Awarding Plaintiffs their reasonable attorneys' fees and costs to the extent allowed by law; and
- e. Awarding such other relief as may be just and proper.

Respectfully submitted, this the 19<sup>th</sup> day of June, 2019.

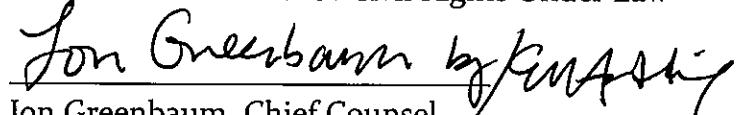
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